Petition

81-1626

No. 81-

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM H. GREEN, *et al.*,
Petitioners,

v.

DONALD T. REGAN, Secretary of the Treasury, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Do Sections 170(a)-(c) and 501(c)(3) of the Internal Revenue Code of 1954, and the Fifth Amendment to the Constitution of the United States, permit the Secretary of the Treasury and Commissioner of Internal Revenue to grant tax-exempt status and deductibility of contributions to private schools which practice racial discrimination; should *Coit v. Green*, 404 U.S. 997 (1971), *aff'g mem. Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971), which holds that they do not allow exemptions to such schools, be overruled?

PARTIES BELOW

Pursuant to Rule 21.1(b) of the Rules of this Court, petitioners state to the Court that the following parties have participated below in this cause:

Plaintiffs: William H. Green, on his own behalf and on behalf of his minor children Connie Green, Belinda Green, Ronnie Green, Janice Green, and Bessie Green; Vernon Tom Griffin, on his own behalf and on behalf of his minor son, Vernon Tom Griffin, Jr.; John D. Wesley, on his own behalf and on behalf of his minor children, Shirley Ann Wesley, Florence Wesley, and Jessie Lee Wesley; Warren G. Booker, on his own behalf and on behalf of his minor adopted son, Adam Wayne Gilley; and Essie Bernice Austin.

Defendants: Donald T. Regan, as Secretary of the Treasury of the United States; Roscoe Egger, as Commissioner of Internal Revenue.

Defendant-Intervenors: Dan Coit, on his own behalf and on behalf of his minor children, Lauren Faye Coit and Linda Ann Coit; and the Clarksdale Baptist Church, of Clarksdale, Mississippi.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	4
REASONS FOR GRANTING THE WRIT	6

TABLE OF AUTHORITIES

Cases:

Bob Jones University v. United States, No. 81-3	5, 6, 7
Coit v. Green, 404 U.S. 997 (1971)	2, 7
Goldsboro Christian Schools, Inc. v. United States, No. 81-1	5, 6, 7
Green v. Connally, 330 F. Supp. 1150 (D.D.C.), aff'd mem. sub nom. Coit v. Green, 404 U.S. 997 (1971)	2, 4, 6
Green v. Kennedy, 309 F. Supp. 1127 (D.D.C.), appeal dismissed sub nom. Cannon v. Green, 398 U.S. 956 (1970)	2, 4
Havens Realty Corp. v. Coleman, 50 U.S.L.W. 4232 (U.S. Feb. 24, 1982)	7
Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973)	7n
Mercer v. Theriot, 377 U.S. 152 (1964)	7n
United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199 (1968)	7
United States v. Nixon, 418 U.S. 683 (1974)	7
United States v. W.T. Grant Co., 345 U.S. 629 (1953)	7
West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)	7n
Wright v. Regan, D.C. Cir. No. 80-1124 (Feb. 18, 1982)	6n

TABLE OF AUTHORITIES—Continued

Statutes: Page

28 U.S.C. § 1254(1) 1, 3
28 U.S.C. § 1292(a)(1) 2, 7
28 U.S.C. § 2101(3) 1

Regulations and Rules:

Sup. Ct. Rule 18 ..... 3, 8n
Rev. Rul. 75-231, 1975-1 Cum. Bull. 158 ..... 5n
Rev. Rul. 71-447, 1971-2 Cum. Bull. 230 ..... 5n
Rev. Proc. 75-50, 1975-2 Cum. Bull. 587 ..... 5n
Rev. Proc. 72-54, 1972-2 Cum. Bull. 834 ..... 5n

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners William H. Green, et al. respectfully pray that, pursuant to 28 U.S.C. §§ 1254(1) and 2101(3) and Rule 18 of the Rules of this Court, a writ of certiorari issue to review this matter prior to the issuance of judgment in the court below.

OPINIONS BELOW

The Order of the United States District Court for the District of Columbia denying petitioners' motion for further injunctive relief was issued without opinion on February 4, 1982 and is reprinted in the Appendix hereto.

Prior reported opinions in this matter appear at 309 F. Supp. 1127 (D.D.C.), *appeal dismissed sub nom. Cannon v. Green*, 398 U.S. 956 (1970) (preliminary injunction); and 330 Supp. 1150 (D.D.C.), *aff'd mem. sub nom. Coit v. Green*, 404 U.S. 997 (1971) (declaratory judgment and permanent injunction).

JURISDICTION

On June 30, 1971, a three-judge United States District Court for the District of Columbia issued a declaratory judgment that Sections 170(a)-(c) and 501(c)(3) of the Internal Revenue Code of 1954 did not permit the grant of tax exemptions to racially discriminatory private schools and a permanent injunction against the Secretary of the Treasury and Commissioner of Internal Revenue requiring specific procedures to be followed by the Internal Revenue Service in passing upon the applications for such exemptions of private schools in Mississippi. This Court summarily affirmed the judgment *sub nom. Coit v. Green*, 404 U.S. 997 (1971). In 1976 petitioners sought further relief to enforce the original judgment, which was granted in part by district court orders of May 5 and June 2, 1980. Thereafter, on January 13, 1982 petitioners again moved for further injunctive relief in the district court in light of a public announcement by the respondent Secretary of the Treasury that exemptions would be granted to educational institutions which practiced racial discrimination.

Petitioners' request for further injunctive relief was denied by the district court on February 4, 1982 (1a). On February 5, 1982 petitioners filed a Notice of Appeal to the United States Court of Appeals for the District of Columbia Circuit; the appeal has been assigned D.C. Cir. No. 82-1134. The Court of Appeals has jurisdiction over the appeal pursuant to 28 U.S.C. § 1292(a)(1) since the district court has denied injunctive relief. Jurisdiction over the case in this Court is therefore provided by 28

U.S.C. § 1254(1); *see* Rule 18 of the Rules of this Court. No judgment has yet been rendered by the Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides as follows, in pertinent part:

> No person . . . shall be . . . deprived of life, liberty, or property, without due process of law . . . .

Section 170(a)-(c) of the Internal Revenue Code of 1954, 26 U.S.C. § 170(a)-(c) provides as follows, in pertinent part:

> (a) Allowance of deductions
>
> (1) General rule. There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. . . .
>
> . . .
>
> (c) Charitable contribution defined. For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of—
>
> . . .
>
> (2) A corporation, trust, or community chest, fund, or foundation—
>
> . . .
>
> (B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes. . . .

Section 501(c)(3) of the Internal Revenue Code of 1954, 26 U.S.C. § 501(c)(3), exempts from taxation the following organizations, *inter alia*:

> (3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . . .

STATEMENT OF THE CASE

This action was filed in 1969 to restrain the Department of the Treasury and the Internal Revenue Service from affording federal tax-exempt status and deductibility of contributions to racially discriminatory private schools. On January 27, 1970, a three-judge district court issued a preliminary injunction, *Green v. Kennedy*, 309 F. Supp. 1127 (D.D.C.), *appeal dismissed sub nom. Cannon v. Green*, 398 U.S. 956 (1970) and on June 30, 1971 the court issued a declaratory judgment that, *inter alia*,

> Section 501(c)(3) of the Internal Revenue Code of 1954 does not provide a tax exemption for, and Section 170(a)-(c) of the Code, does not provide a deduction for a contribution to, any organization that is operated for educational purposes unless the school or other educational institution involved has a racially nondiscriminatory policy as to students.

330 F. Supp. 1150, 1179 (D.D.C.), *aff'd mem. sub nom. Coit v. Green*, 404 U.S. 997 (1971). Although the Internal Revenue Service had on July 10, 1970 announced that it would no longer interpret the Code to allow exemption for such schools, the three-judge court issued its formal declaratory judgment because "plaintiffs are entitled to a declaration of relief on an enduring, permanent basis, not on a basis that could be withdrawn with a shift in the tides of administration, or changing perceptions of sound discretion." *Green v. Connally*, *supra*, 330 F. Supp. at 1170-71. The ruling was grounded upon "a federal policy derived from Congressional enactment as well as the Constitution itself" and interpreted the Code so as to avoid "serious constitutional questions" which would be raised by a contrary construction. *Id.* at 1161, 1164.

Following the court's 1971 decision, the Internal Revenue Service adopted and implemented a series of Revenue Rulings and Revenue Procedures consonant with the de-

claratory judgment.[1] In 1976, however, petitioners reopened the case and sought additional injunctive relief to carry out the original decree and judgment. The district court granted such relief in 1980. The litigation continued thereafter on issues raised by the post-1980-judgment-intervenor Clarksdale Baptist Church, which have not yet been resolved by the district court.

On January 8, 1982, the Treasury Department announced that it would no longer deny tax-exempt status to racially discriminatory private schools and that it would revoke the pertinent Revenue Rulings and Procedures adopted after the three-judge court's 1971 decision. *See* Memorandum for the United States in Nos. 81-1 and 81-3 (*Goldsboro Christian Schools, Inc. v. United States* and *Bob Jones University v. United States*), filed January 8, 1982. The public announcement by the respondents made no reference to the outstanding court orders in this matter nor to any exception to the new policy for private schools in Mississippi.

On January 13, 1982, petitioners filed a motion for further injunctive relief with the district court, seeking injunctions (a) to require respondents Secretary of the Treasury and Commissioner of Internal Revenue to continue to enforce the pertinent Revenue Rulings and Revenue Procedures so as to carry out the 1971 declaratory judgment construing the Internal Revenue Code to bar tax exemptions for discriminatory private schools; and (b) to require said respondents to adhere to the prior injunctive decrees of the district court. In response to that motion, on January 25, 1982 the government submitted an affidavit to the district court from the Assistant Commissioner (Employee Plans and Exempt Organizations) of the Internal Revenue Service which represented that the Service was continuing to comply with the prior

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[1] Rev. Rul. 71-447, 1971-2 Cum. Bull. 230; Rev. Proc. 72-54, 1972-2 Cum. Bull. 834; Rev. Rul. 75-231, 1975-1 Cum. Bull. 158; Rev. Proc. 75-50, 1975-2 Cum. Bull. 587.

injunctive decrees in this matter.[2] Thereafter, on February 4, 1982 the district court denied petitioners' request for additional injunctive relief and on February 5 petitioners appealed to the U.S. Court of Appeals for the District of Columbia Circuit.[3]

REASONS FOR GRANTING THE WRIT

As reflected in the Statement of the Case, *supra*, the United States Treasury Department publicly announced on January 8, 1982 that it would no longer deny tax exemptions to racially discriminatory private schools. It did not seek modification of the outstanding decrees in the instant matter which require such denials, however. Instead, as reflected in the affidavit submitted to the district court on January 25, 1982, the government is voluntarily adhering to the decrees at the present time. It has chosen to litigate the validity of the declaratory judgment in *Green v. Connally*, *supra*, in two different cases presently pending before this Court: *Goldsboro Christian Schools, Inc. v. United States* (No. 81-1) and *Bob Jones University v. United States* (No. 81-3).

On February 25, 1982, the United States submitted a Motion for Leave to File Brief Out of Time in Nos. 81-1 and 81-3, and on the same date filed its proposed Brief in typescript. That Brief, which "sets forth the position of

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[2] The affidavit is reprinted at pp. 13a-14a of the Supplemental Memorandum for the United States in Nos. 81-1 and 81-3, filed February 3, 1982.

[3] On February 10, 1982 petitioners filed a Motion for Injunction Pending Appeal with the U.S. Court of Appeals for the District of Columbia Circuit. That motion has not yet been acted upon, and in light of a *pendente lite* Order issued February 18, 1982 in Wright v. Regan, D.C. Cir. No. 80-1124 (*see* copy attached to Motion of the United States for Leave to File Brief Out of Time in Nos. 81-1 and 81-3, filed February 25, 1982), on February 23 petitioners advised the Court of Appeals in a Reply that "[s]o long as the February 18 Order in *Wright* remains in effect, there is no immediate prospect of irreparable injury to the rights of the plaintiffs-appellants in this matter . . . ."

the United States," n.1, attacks the *Green* declaratory judgment and reasoning and seeks to have this Court overrule its summary affirmance in *Coit v. Green*, 404 U.S. 997 (1971). It is thus evident that there is an adversary controversy affecting the legal relations of the parties herein: the petitioners (plaintiffs) in *Green* and the respondents Secretary of the Treasury and Commissioner of Internal Revenue. The government has sought to avoid judicial resolution of the controversy *in this lawsuit* by a voluntary cessation or suspension of its new policy with respect to Mississippi schools. *See, e.g., Havens Realty Corp. v. Coleman*, 50 U.S.L.W. 4232, 4234 n.10 (U.S. Feb. 24, 1982); *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968); *United States v. W. T. Grant Co.*, 345 U.S 629, 633 (1953).

In order to protect the prior judgments in their favor, petitioners sought further injunctive relief from the district court and, when that relief was denied, noticed an appeal to the U.S. Court of Appeals for the D.C. Circuit, which is presently pending. Since that appeal is properly "in" the Court of Appeals, 28 U.S.C. § 1292(a)(1), this Court may issue a writ of certiorari to bring the case before it. *United States v. Nixon*, 418 U.S 683, 692 (1974).

By doing so, and consolidating this matter with Nos. 81-1 and 81-3, the Court will be in a position to decide the important question presented herein—which it also has before it in the *Bob Jones* and *Goldsboro* matters—in a full adversary setting,[4] without the necessity of the Court's appointing an *amicus curiae* in Nos. 81-1 and 81-3, *see* Motion for Leave to File Motion for Divided

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[4] Once the case is brought here on a writ of certiorari, this Court may pass upon earlier rulings by the courts below, *see* Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 364 n.1 (1973); Mercer v. Theriot, 377 U.S. 152, 153-54 (1964) and cases cited; the Court may, of course, reconsider its own precedents, *see, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 630 (1943).

Argument Out of Time and Motion for Divided Argument, filed by the United States in Nos. 81-1 and 81-3 on February 25, 1982.

Petitioners are prepared to respond to the arguments advanced by the United States in its February 25, 1982 Brief in Nos. 81-1 and 81-3 without delay. The circumstances surrounding the important legal question involved and the history of Nos. 81-1 and 81-3 before this Court during the current Term strongly suggest the "imperative public importance" [5] of issuing a writ of certiorari to review the instant case together with Nos. 81-1 and 81-3 with full and thorough adversary presentation before the Court.

WHEREFORE, petitioners respectfully pray that a writ of certiorari be granted.

Respectfully submitted,

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[5] Supreme Court Rule 18.

Appendix

APPENDIX

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1355-69

WILLIAM H. GREEN, *et al.*,
Plaintiffs,
v.
DONALD T. REGAN, *et al.*,
Defendants.

ORDER

AND NOW, this 4th day of February, 1982, upon consideration of the plaintiffs' Motion to Vacate Stay of Proceedings, to Shorten Time for Response Hereto, and for Further Injunctive Relief to Enforce Declaratory Judgment and Preserve the *Status Quo*, of the defendants' and intervenor's responses thereto, and after hearing oral argument of all counsel;

AND it appearing to the Court that this case involves only private schools in the State of Mississippi, and the Court having already entered injunctive decrees applicable to Mississippi private schools, it is hereby

ORDERED, ADJUDGED AND DECREED that the plaintiffs' request for further injunctive relief is DENIED;

It is further ORDERED that the stay of proceedings herein entered on January 6, 1982 shall remain in effect pending disposition by the Supreme Court of the United States in the *Bob Jones University v. United States* (No. 81-3) and *Goldsboro Christian Schools, Inc. v. United States* (No. 81-1) cases.

/s/ George L. Hart, Jr.
HONORABLE GEORGE L. HART, JR.
United States District Judge

[Filed Feb. 4, 1982]

Supplemental Brief

1

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OCTOBER TERM, 1981

NO. 81-1626

WILLIAM H. GREEN, et al.,

Petitioners,

v.

DONALD T. REGAN, Secretary of the Treasury, et al.,

Respondents.

MOTION TO EXPEDITE CONSIDERATION
OF PETITION FOR A WRIT OF CERTIORARI
AND TO CONSOLIDATE WITH NOS. 81-1 AND 81-3

Petitioners William H. Green, et al., by their undersigned counsel, respectfully pray that this Court expedite consideration of the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit filed herewith, and upon such expedited consideration, grant the Petition and consolidate this matter with Nos. 81-1 (Goldsboro Christian Schools, Inc. v. United States) and 81-3 (Bob Jones University v. United States) presently pending before this Court. In support of their motion, petitioners would respectfully show the Court as follows:

1. The Question Presented in the appended Petition for Writ of Certiorari is the same issue which will be addressed by this Court in Nos. 81-1 and 81-3.

2. The Brief for the United States in Nos. 81-1 and 81-3, as tendered with a Motion for Leave to File Brief Out of Time on February 25, 1982, argues that the prior declaratory judgment in this case, Green v. Connally, 330 F. Supp. 1150, 1179 (D.D.C.),

aff'd mem. sub nom. Coit v. Green, 404 U.S. 997 (1971), was incorrectly decided and invites this Court to overrule its summary affirmance thereof.

3. Petitioners' rights to the relief previously granted them in this action will, therefore, be directly determined by the Court's decision of the issue in Nos. 81-1 and 81-3.

4. The United States has reversed its legal position between the filing of its Brief in Response to the Petitions for Writs of Certiorari in Nos. 81-1 and 81-3, and the time of the filing of its February 25, 1982 Brief on the merits in those cases, and the government has now suggested to the Court that it appoint an amicus curiae in Nos. 81-1 and 81-3 to argue in support of the judgments below in those cases. See Motion for Leave to File Motion for Divided Argument and Motion for Divided Argument, filed February 25, 1982.

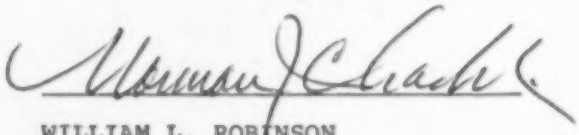
5. Because of the overwhelming public importance of the issue presented, this is an appropriate case in which to grant certiorari prior to judgment in the Court of Appeals. Petitioners' position has been adversary to that of the United States throughout this litigation and it is adverse to the position of the United States as reflected in its February 25, 1982 Brief in Nos. 81-1 and 81-3. Thus, if certiorari is granted in this matter prior to judgment below, and the case is consolidated with Nos. 81-1 and 81-3, the Court will be assured of adequate presentation and ventilation of the difficult questions involved by fully adverse parties.

6. This case is in an appropriate posture for expedition. Petitioners are prepared to go forward on an expedited basis. Respondent federal officials, represented by the United States, have recently filed a substantial brief in Nos. 81-1 and 81-3

on the legal issue involved. The only intervenor which has participated actively in the litigation below during the last several years, the Clarksdale Baptist Church, is represented by the same counsel as Bob Jones University, petitioner in No. 81-3.

WHEREFORE, for the foregoing reasons, petitioners respectfully pray that the Court expedite consideration of the Petition for a Writ of Certiorari herein and issue its Order directing that responses thereto be filed with the Court no later than Wednesday, March 17, 1982 so that the Petition may be considered by the Court at its March 19 conference; and thereafter, that the Court grant the Petition and consolidate this matter with Nos. 81-1 and 81-3 and set an expedited briefing schedule.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of March, 1982, I served one copy of the foregoing Motion to Expedite Consideration of Petition for a Writ of Certiorari and to Consolidate with Nos. 81-1 and 81-3 upon counsel for the parties hereto, by depositing same in the United States mail, first-class postage prepaid, addressed as follows:

Hon. Lawrence G. Wallace
Acting Solicitor General
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I further certify that I served one copy of the foregoing Motion and one copy of the Petition for Certiorari filed herewith upon counsel for the parties to Nos. 81-1 and 81-3 not already served above, by depositing same in the United States mail, first-class postage prepaid, addressed as follows:

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All parties required to be served have been served.

Norman J. Chachkin

Opposition

1

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Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF RESPONDENT CLARKSDALE BAPTIST CHURCH

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COUNTERSTATEMENT OF QUESTION PRESENTED

Did the district court err in denying the motion of petitioners, parents of black school children in Mississippi, for an injunction restraining the Secretary of the Treasury from revoking or failing to enforce rulings and procedures* previously issued by the Internal Revenue Service regarding disqualification for tax-exempt status under Section 501(c)(3) of the Internal Revenue Code of schools which maintain a racially discriminatory policy as to students?

* Revenue Ruling 71-447, 1971-2 Cum. Bull. 230; Rev. Proc. 72-54, 1972-2 Cum. Bull. 834; Rev. Proc. 75-231, 1975-1 Cum. Bull. 158; and Rev. Proc. 75-50, 1975-2 Cum. Bull. 587.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
COUNTERSTATEMENT OF THE CASE	1
REASONS WHY THE WRIT SHOULD BE DENIED	5
CONCLUSION	9
APPENDIX:	
United States Court of Appeals Order, Filed March 24, 1982	A1

TABLE OF AUTHORITIES

Cases: Page

Allen v. Wright, No. 81-757 8

Bob Jones University v. United States, No. 81-3 .....3, 5, 7, 8

Cannon v. Green, 398 U. S. 956 (1970) 6

Goldsboro Christian Schools, Inc. v. United States, No. 81-1 3, 5, 7, 8

Green v. Connally, 330 F. Supp. 1150 (D. D. C. 1971), *aff'd. mem. sub nom.* Coit v. Green, 404 U. S. 997 (1971) 2, 3, 4, 6, 7, 8

Regan v. Wright, No. 81-970 8

Simon v. Eastern Kentucky Welfare Rights Organization, 426 U. S. 26 (1976) 8

United States v. Nixon, 418 U. S. 683 (1974) 7, 8

Wilson v. Girard, 354 U. S. 524 (1957) 8

Wright v. Regan, D. C. Cir. No. 80-1124 ..... 3, 4

Youngstown Sheet and Tube Co. v. Sawyer, 343 U. S. 579 (1952) 8

Statutes:

Internal Revenue Code of 1954:

§ 501(c)(3) ..... i, 7

Constitutions:

U. S. Constitution:

Amendment I 2, 3

Other Authorities:

Rev. Proc. 72-54, 1972-2 C. B. 834 ..... i, 3

Rev. Proc. 75-50, 1975-2 C. B. 587 ..... i, 3

Rev. Proc. 75-231, 1975-1 C. B. 158 i

Rev. Rul. 71-447, 1971-2 C. B. 230 ..... i, 3

Sup. Ct. Rule 18 ..... 5, 7

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Secretary of the Treasury, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF IN OPPOSITION OF RESPONDENT CLARKSDALE BAPTIST CHURCH

COUNTERSTATEMENT OF THE CASE

In 1969, black parents in Mississippi brought an action in the United States District Court for the District of Columbia to enjoin the Department of the Treasury and the Internal Revenue Service from granting tax exemptions to racially discriminatory private schools in the State of Mississippi. In 1971, the district court entered an opin-

ion and judgment denying such tax exemptions, and that holding was summarily affirmed by this Court. *Green v. Connally*, 330 F. Supp. 1150 (D. D. C. 1971), *aff'd. mem. sub nom. Coit v. Green*, 404 U. S. 997 (1971). Following this decision, the Internal Revenue Service promulgated a series of Revenue Rulings and Revenue Procedures which incorporated the court's holding.

On May 5, 1980, the district court issued an Order and Permanent Injunction in response to a motion of Green, *et al.* (the original plaintiffs, and the petitioners herein) to enforce the 1971 decree rendered in *Green v. Connally*, and for further declaratory and injunctive relief. On June 2, 1980, the district court issued an Order Clarifying and Amending the Court's Order and Permanent Injunction of May 5, 1980. Both the May 5, 1980 and June 2, 1980 Orders contemplated, by express language, that "church-related" schools were intended to be included within the term, "private schools." They also stated a presumption that certain private (including religious) schools are discriminatory and a resulting requirement that such schools overcome that presumption by proof of having taken specific action such as recruiting students solely on the basis of race.

No religious schools having been parties to the original action, and no Religion Clause issues having been raised therein, Clarksdale Baptist Church, which was directly subject to the May 5, 1980 and June 2, 1980 orders and which operates a racially nondiscriminatory school as an integral part of its religious ministry, sought intervention. By order of May 14, 1981, the district court granted that intervention.

At the present stage of district court proceedings, an evidentiary record has now been completed with respect to the school operated by Clarksdale Baptist Church and the claims which it has raised under the Free Exercise and

Establishment Clauses of the First Amendment. No schedule for briefing and oral argument has as yet been set.

On January 6, 1982, the district court granted Clarksdale Baptist Church's motion to stay all proceedings until the Supreme Court should have decided the consolidated cases of *Bob Jones University v. United States* (No. 81-3) and *Goldsboro Christian Schools, Inc. v. United States* (No. 81-1). On January 8, 1982, the Treasury Department announced that it could no longer claim authority to deny tax-exempt status to racially discriminatory private schools and that it would revoke those Revenue Rulings and Procedures [1] which had been issued subsequent to the 1971 *Green* injunction and had been relied upon by IRS to deny or revoke the tax-exempt status of Bob Jones University and of Goldsboro Christian Schools. At that time, the *Green* plaintiffs requested the district court to vacate the previously entered stay and to grant further injunctive relief to prevent the revocation of these Revenue Rulings and Procedures. The court refused those requests, and the plaintiffs appealed that refusal to the United States Court of Appeals for the District of Columbia Circuit (No. 82-1134).

The *Green* plaintiffs immediately filed a consolidated motion, together with the plaintiffs in *Wright v. Regan* (D. C. Cir. No. 80-1124), for an injunction pending appeal or, in the alternative, for an injunction under the All Writs Act.

The Court of Appeals refused to consolidate the cases, and referred the *Green* motion for injunction pending appeal to the court's motions panel, while entering an interim order in the *Wright* case, on February 18, 1982, temporarily enjoining the IRS from recognizing the tax-exempt

1. Revenue Ruling 71-447, 1971-2 Cum. Bull. 230; Rev. Proc. 72-54, 1972-2 Cum. Bull. 834; Rev. Proc. 75-231, 1975-1 Cum. Bull. 158; and Rev. Proc. 75-50, 1975-2 Cum. Bull. 587.

status of any school which does not have a racially nondiscriminatory policy as to students. In light of the issuance of that injunction order, the *Green* plaintiffs, on February 23, 1982, advised the Court of Appeals that "So long as the February 18 Order in *Wright* remains in effect, there is no immediate prospect of irreparable injury to the rights of the plaintiffs-appellants in this matter."

On March 3, 1982, the petitioner *Green* plaintiffs filed a petition for writ of certiorari, in advance of judgment in the Court of Appeals. Thereafter, the Court of Appeals, on March 25, 1982, denied the motion for injunction pending appeal. (See Appendix A hereto).

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioners have asked this Court to grant a writ of certiorari in order to bring the instant case before it and have also moved to consolidate it with *Bob Jones University v. United States* (No. 81-3) and *Goldsboro Christian Schools, Inc. v. United States* (No. 81-1), which presently remain pending before this Court. Clarksdale Baptist Church has previously filed a response to petitioners' motion to consolidate, on March 15, 1982, and further opposes granting of the Petition for a Writ of Certiorari for the following reasons:

1. The petition for certiorari has been filed with this Court pursuant to Rule 18 of the Court's Rules. But petitioners have not, in any sense, demonstrated that *their* case "is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court."

Petitioners' motion for injunctive relief, filed in the district court on January 13, 1982, was made in response to the Treasury Department's announcement of January 8, 1982, that it was about to revoke certain IRS rulings and procedures governing denial of tax-exempt status to schools which discriminate racially.[2] In their motion, petitioners asked for two forms of injunctive relief: 1) an order "enjoining the defendants from taking any steps to revoke, or from failing to enforce" the subject rulings and procedures (this being linked to the 1971 declaratory judgment in *Green*); and 2) an order "enjoining the defendants from failing to enforce fully, or from taking any steps inconsistent with, and prior injunctive decrees of this Court respecting the tax-exempt status of private schools in Mississippi." (Motion to Vacate Stay, etc., Claims for Relief ¶¶ d and e).

2. Those rulings and procedures remain, to this day, unrevoked and therefore fully effective.

The petitioners, by their motion, thus acknowledged that the 1971 *Green* injunction had effect only in Mississippi, and sought, therefore, to expand that 1971 injunction so as to give it nationwide effect. In reply to this motion, the government defendants and the intervenor Clarksdale Baptist Church both pointed out that the Treasury Department had announced that it was in full compliance with all injunctive decrees relating to schools in Mississippi, and, in addition, was committed, by its subsequent announcement of January 18, 1982, to withholding grants of exemption as to any schools outside Mississippi found to be discriminating, contrary to the subject IRS rulings, save for Bob Jones University and Goldsboro Christian Schools, Inc. Since petitioners had no connection whatsoever with these latter two schools, the Church and the government defendants disputed the existence of any threatened injury to the rights of petitioners.

Finding that the rights of petitioners were adequately protected by the 1971 injunction, and that the case "involves only private schools in the State of Mississippi," the district court denied the requested relief.[3] (Appendix to

3. The district court was fully justified in concluding that the case involved only Mississippi schools: 1) the original complaint included only a class of Mississippi plaintiffs and was targeted only against schools in Mississippi; 2) a motion to intervene was denied, on January 21, 1970, as to all movants save for those residing in the State of Mississippi, the court reciting that "the trial on the merits in this litigation should encompass only issues relating to the State of Mississippi." (Order Granting Partial Intervention, January 21, 1970). An appeal from this Order was dismissed by the Supreme Court on June 15, 1970 (*Cannon v. Green*, 398 U. S. 956); and 3) a motion to intervene in this case by the Association of Christian Schools International (ACSI) was denied by the district court on July 9, 1980 because ACSI "seeks to represent the interests of religious schools outside the State of Mississippi." (Order Denying Intervention, July 9, 1980). In light of the above, Judge Hart was not incorrect in stating that any passages in the

Petition for Certiorari, 1a). Petitioners appealed from this Order.

Petitioners' appeal is thus a very narrow one: it seeks to overturn a ruling which held only that, *as to their claims,* previously entered decrees were fully adequate, and that, because of the nature of the class action involved (which related only to Mississippi), the plaintiffs were employing the wrong vehicle (the *Green* case) to achieve their goal of preventing recognition by IRS of the tax-exempt status of Bob Jones University and of Goldsboro Christian Schools, Inc. The district court did not, in any way, disturb the construction of Section 501(c)(3) of the Internal Revenue Code which underlays the 1971 *Green* injunction, and petitioners are absolutely incorrect in stating to this Court that the order appealed from presents any issue at all relating to the validity of that construction.[4]

The question thus actually presented by petitioners' appeal, now lodged in the court of appeals, is whether *Green* can be said to be anything more than a Mississippi class action. It is most difficult to see how the importance of this issue in any sense rises to the stature of those issues for which Rule 18 certiorari is warranted, and has been granted in the past. All attempts by petitioners to borrow importance from the *Bob Jones University* and *Goldsboro Christian Schools* cases aside, the claims presented by their appeal are minor indeed when compared to issues of sub-

3. (Cont'd.)

1971 *Green* opinion which could in any way be interpreted to apply outside Mississippi were purely *obiter dicta.* (Transcript of Hearing, February 4, 1982).

4. While Clarksdale Baptist Church has raised a challenge to the validity of that construction in its Motion to Modify Injunction in the district court, that Motion has not been ruled upon by the district court, and the issue is thus not "in" the Court of Appeals. *United States v. Nixon,* 418 U. S. 683, 692 (1974). That being so, it is not ripe for review by this Court under Rule 18.

jecting the President of the United States to judicial contempt proceedings, *United States v. Nixon*, 418 U. S. 693 (1974); presidential emergency seizure of the steel industry, *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U. S. 579 (1952); or controversies between the United States and a sovereign foreign nation, *Wilson v. Girard*, 354 U. S. 524 (1957).

Stripped of all pretense, it is clear that petitioners derive their asserted grounds of "public importance" solely from their desire to argue the *Bob Jones University* and *Goldsboro Christian Schools* cases—cases which present issues which, for petitioners, still lie unresolved in the *district court*.

2. This Court's decisions on the issue of standing cast grave doubt upon the ability of petitioners to further maintain this action.

In *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U. S. 26 (1976), this Court held that third parties did not possess the requisite standing to litigate the tax-exempt status under the Internal Revenue Code of exempt organizations. The parallel between *Simon* and *Green* on this issue is exact and compelling, and Clarksdale Baptist Church has raised the standing issue in the district court. That issue, one within the continuing equity jurisdiction of the district court, remains unresolved, and a substantial cloud thus hangs over petitioners' very status as litigants.

Respondent Clarksdale Baptist Church submits that the standing issue is an important one, and is perhaps best to be resolved in the cases of *Allen v. Wright* (No. 81-757) and *Regan v. Wright* (No. 81-970), in which petitions for certiorari are now pending before this Court. This issue is a fundamental one, and should be settled before the *Green* petitioners proceed any further.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, it is respectfully requested that the writ of certiorari be denied.

Respectfully submitted,

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Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1134

SEPTEMBER TERM, 1982

CIVIL ACTION NO. 69-01355

William H. Green, on his own behalf and on behalf of his minor children, et al.,

Appellants

v.

Donald T. Regan, as Secretary of the Treasury of the United States, et al.

BEFORE: TAMM, GINSBURG and BORK, *Circuit Judges*

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED MAR 24, 1982

GEORGE A. FISHER, *Clerk*

ORDER

Upon consideration of the motion for injunction pending appeal, of the responses and reply thereto, and of the

request by intervenor Clarksdale Baptist Church for oral argument on the motion for injunction pending appeal, it is

ORDERED that the motion for injunction pending appeal is denied. *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958). It is

FURTHER ORDERED that the request for oral argument on the motion for injunction pending appeal is denied.

Per Curiam

Circuit Judge Ginsburg did not participate in this order.

Supplemental Brief

1

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March 5, 1982

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SUPREME COURT, U.S.

Francis J. Lorson
Deputy Chief Clerk
Supreme Court of the United States
Washington, DC 20543

pg 16(a) March 5 Conf

Re: Green v. Regan, No. 81-1626

Dear Mr. Lorson:

In confirmation of your phone conversation this day with Philip J. Murren of the Harrisburg, Pennsylvania, firm of Ball & Skelly, our co-counsel in Green v. Regan (D. C. Circuit No. 82-1134), please be advised that the intervenor in the above-referenced matter, Clarksdale Baptist Church, hereby states its opposition to granting of the motion by petitioners to expedite consideration of their petition (received on this day):

1. Petitioners have represented in their statement of Questions Presented the nature of the narrow issue before the U.S. Court of Appeals in No. 82-1134, namely, whether the existing injunction in Green should be expanded nationwide. That appeal presents no issue whatever regarding the construction of §501(c)(3) or §170 which underlies the existing injunction.

2. Intervenors challenge the standing of the Green plaintiffs in the District Court for the same reasons stated in the petitions for certiorari now under review in Allen v. Wright (No. 81-757) and Regan v. Wright (No. 81-970). With the standing of petitioners seriously in issue, granting of their petition on the grounds asserted would be premature.

3. Intervenor urgently requests the full measure of time allotted by the rules of this Court in which to respond to the petition herein.

A more fully-developed response will follow. This short response is submitted in this form owing to the exigencies of the situation

10

Very truly yours,

James Edward Ablard

James Edward Ablard

PJM/JEA/eg
cc: Norman Chachkin
Acting Solicitor General Lawrence G. Wallace

Supplemental Brief

2

RECEIVED
MAR 15 1982
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SUPREME COURT, U.S.

NO. 81-1626

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WILLIAM H. GREEN, et al.,

Petitioners,

v.

DONALD T. REGAN, Secretary of the Treasury, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONSE OF CLARKSDALE BAPTIST CHURCH TO PETITIONERS' MOTION TO EXPEDITE CONSIDERATION AND TO CONSOLIDATE WITH NOS. 81-1 AND 81-3

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81-1626

WILLIAM H. GREEN, et al.,

Petitioners,

v.

DONALD T. REGAN, Secretary of the Treasury, et al.,

Respondents.

RESPONSE OF CLARKSDALE BAPTIST CHURCH TO PETITIONERS' MOTION TO EXPEDITE CONSIDERATION AND TO CONSOLIDATE WITH NOS. 81-1 AND 81-3

Clarksdale Baptist Church (the "Church") a defendant intervenor in Green v. Regan, and the sole religious party in this litigation, opposes the petitioners' Motion to Expedite Consideration and to Consolidate With Nos. 81-1 and 81-3.

As an integral part of its religious mission, the Church operates Clarksdale Baptist School, a non-tax-supported school for children which, as a matter of Biblical requirement, is forbidden to discriminate against any person on account of race.

By orders of the United States District Court for the District of Columbia dated May 5, 1980, and June 2, 1980, the 1971 decree herein (see Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971)) was broadened to include, for the first time, church-related schools and to impose upon all schools encompassed within its terms numerous requirements (e.g., that a church-school engage in recruiting on the basis of race and not solely on the basis of religion).

Because this broadened injunction applied directly to the Church's school, and because that application raised a series of substantial questions relating to the free exercise of religion and to governmental entanglement with churches, the Church moved to intervene. In its motion it pointed out that in Green v. Connally no religious entity had been a party, no Free Exercise or Establishment Clause issues had been raised, and that the district court in its opinion (id. at 1169) had expressly omitted passing upon any such issues.

On May 14, 1982, the district court granted the Church's motion to intervene. Discovery ensued, including the amassing, through interrogatories, of the answers by the Church to 17 questions propounded by the district court. An evidentiary proceeding respecting the Church's First Amendment claims took place by depositions in October and November, 1981. On January 6, 1982, the district court granted the Church's motion to stay all proceedings until such time as the Supreme Court should enter its decision in the consolidated Bob Jones University (No. 81-3) and Goldsboro Christian Schools (No. 81-1) cases. On February 4, 1982, the district court denied the plaintiffs' (petitioners here) motion to vacate the stay

and to broaden the injunction nationwide. Immediate appeal of that denial was taken to the Court of Appeals, and, on February 10, 1982, the plaintiffs filed a motion for injunction pending that appeal on an emergency basis. On February 18, 1982, the United States Court of Appeals for the District of Columbia ordered that the motion for injunction "be referred forthwith to the motions panel for expeditious consideration." At the same time, the Court of Appeals enjoined the Government, in the case of Wright v. Regan (No. 80-1124), from granting or restoring tax exemption to discriminatory institutions. In light of that injunction, the Green plaintiffs advised the Court of Appeals, on February 23, 1982, that "there is no immediate prospect of irreparable injury to the rights of plaintiff-appellants in this matter" (Reply of Plaintiffs Appellants, p. 2, No. 82-1134, D.C. Circuit). On March 3, 1982, petitioners petitioned for a writ of certiorari and, at this same time, filed the motion to which this is a response.

The Church opposes this granting of the motion on the following grounds:

1. Green v. Regan is not ripe for review and disposition by the Supreme Court of the United States, and therefore should not be consolidated with cases already lodged in this Court. There has as yet been no judgment of any court below upon the merits of the case insofar as the Church and its claims are concerned, nor have briefs and oral argument pertaining thereto been filed. If the Supreme Court would grant the petition it would in effect become a trial court in having to evaluate all the evidence adduced in the October-November evidentiary proceedings.

2. The Church's Motion to Modify Injunction, filed in the district court on June 5, 1981, stated the following:

> "3(n). The Order denies fundamental liberties of the Church without due process of law, contrary to the Fifth Amendment, inasmuch as plaintiffs lack the standing requisite to maintain this suit."

The issue of standing, as raised by the Church, has not yet been ruled on by the district court. It is also to be noted that the issue of standing is the sole issue raised by the United States in its petition for certiorari in Wright (Supreme Court Docket No. 81-970) and is the first issue to which the intervenor in Wright addresses himself in his petition for certiorari therein (Docket No. 81-757). Insofar as the Church is concerned, the standing issue herein is as fundamental as it is unresolved. Nothing in the record evidences that any plaintiff herein ever sought and was denied admission to Clarksdale Baptist School or was the object of any sort of discrimination of any sort therein. While the Green plaintiffs standing remains under a cloud, it is inappropriate for them to be heard in this Court.

3. It is true that an issue in Green is also found in Bob Jones University - Goldsboro Christian Schools - namely, whether Green v. Connally has application to church-schools. But, in Green, that issue is not ripe for review, the only issue presently existing being whether the Green v. Connally 1971 injunction should be expanded nationwide.

4. The motion, further, is baseless insofar as it demands expedited consideration of the petition for certiorari. As noted above, on February 23, 1982, the petitioners, in Paragraph 1 of their Reply of Plaintiffs-Appellants informed

the Court of Appeals that their rights were not in jeopardy, so long as the Court of Appeals' order of February 18, 1982 in Wright remained in effect. On March 3, 1982, when the petition for certiorari had been filed, and indeed, today, the February 18, 1982, order has been neither vacated or otherwise modified.

5. Petitioners have asked the Court to contract the time available for response to their petition so as to require the filing of any such response by March 17, 1982. It will be virtually impossible to prepare and file a printed response within that time. Further, petitioners have demonstrated no compelling reason why the rights of the Church should be prejudiced by denying it the full measure of time available under the Rules of this Court for filing of a response in ordinary cause.*

CONCLUSION

For all of the foregoing reasons the motion should be denied.

Respectfully submitted,

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---

* Having received the petition on March 5, 1982, the Church's response is due on April 5, 1982

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(A)

5

WILLIAM H. GREEN, et al.,

Plaintiffs,

v.

G. WILLIAM MILLER, et al.,

Defendants.

Civil Action No. 69-1355

ORDER AND PERMANENT INJUNCTION

This matter having come before this Court on plaintiffs' motion for an order to enforce the decree in Green v. Connally, 330 F. Supp. 1150 (D.D.C.), aff'd sub nom. Coit v. Green, 404 U.S. 997 (1971), and for further declaratory and injunctive relief, and the plaintiffs having moved for summary judgment, and the defendants having moved for summary judgment, and this Court having considered the entire record including depositions, answers to interrogatories, requests for admissions, pleadings, and other documents submitted by the parties, and oral argument thereon, and it appearing to this Court that there is no genuine issue of material fact, and it further appearing to this Court that the defendants have not violated the order of June 30, 1971, but that said order requires supplementation and modification, it is hereby

ORDERED, that the permanent injunction entered by this Court on June 30, 1971 remains fully in effect but is supplemented and modified as follows:

Defendants G. William Miller, as Secretary of Treasury, and Jerome Kurtz, as Commissioner of Internal Revenue, their agents, servants, employees, attorneys, and successors, are enjoined and restrained from according tax-exempt status to, and from continuing the tax-exempt status now enjoyed by, all Mississippi private schools or the organizations that that operate them, which:

(1) which have been determined in adversary or administrative proceedings to be racially discriminatory; or were established or expanded at or about the time the public school districts in which they are located or which they serve were desegregating, and which cannot demonstrate that they do not racially discriminate in admissions, employment, scholarships, loan programs, athletics, and extra-curricular programs.

(2) The existence of conditions set forth in Paragraph (1) herein raises an inference of present discrimination against blacks. Such inference may be overcome by evidence which clearly and convincingly reveals objective acts and declarations establishing that such is not proximately caused by such school's policies and practices. Such evidence might include, but is not limited to, proof of active and vigorous recruitment programs to secure black students or teachers, including students' grants in aid; or proof of continued, meaningful public advertisements stressing the school's open admissions policy; or proof of meaningful communication between the school and black groups and black leaders within the community concerning the school's nondiscrimination policies, and any other similar evidence calculated to show that the doors of the private school and all facilities and programs therein are indeed open to students or teachers of both the black and white races upon the same standard of admission or employment.

In order to ensure that defendants have information upon which they can make a preliminary judgment as to whether a private school is actually practicing racial discrimination, the following modifications are made to this Court's 1971 Permanent Injunction:

(3) Provision II(A)(2) of the Permanent Injunction is amended to require that printed notices must be published on a regular basis no less than four (4) times annually for a period of three (3) years in a newspaper of general circulation serving the area from which the school draws its student body.

(4) Provision II(A)(2)(a) is further amended to require that any radio advertisements used by a school to publicize its policy of nondiscrimination must be broadcast with sufficient frequency to be reasonably designed to reach its intended audience in the minority community. A school employing this method of publicizing its nondiscriminatory policy must supply the IRS with the dates and times of transmission the radio station used; the tape and a written transcript of the announcement; and both the number of times the message was broadcast on a particular day and the number of times it was broadcast during the year.

(5) Provisions (II)(B)(1)-(3) are amended to require that the information required must be supplied by each school as set forth in Paragraph (1) herein on an annual basis for a period of three (3) years. The IRS shall not approve or continue the tax-exempt status of any such Mississippi private school which fails to supply any of the required data or other information.

(6) Provisions II(B)(1)-(3) are further amended to require that the following information be supplied on an annual basis for a period of three (3) years:

(a) the race of board members;

(b) the grades served by the school from its inception to the present;

(c) the date the school opened for the first time and grades served upon opening;;

(d) the dates additional grades were added;

(e) whether the school is presently recognized as exempt from federal income taxes;

(1) the date on which the exemption was granted;

(f) whether the school received textbooks from the State of Mississippi under the State's textbook program;

(1) whether the school ever withdrew from such program or whether it was held ineligible to receive textbooks in any judicial or administrative proceeding;

(g) whether any tuition due the school has been waived;

(1) if so, the number of students by race, granted such waiver during each school year.

(7) The defendants are enjoined from continuing in effect any ruling recognizing tax-exempt status of any Mississippi private school as set forth in Paragraph (1) herein unless the showing and information required by the Permanent Injunction as amended shall be made and supplied within 120 days from the date of this Order, or such additional period, not to exceed 120 days, as defendants may provide on cause shown in order for the school to make the showing or supply the information required hereunder.

(8) The defendants are further enjoined to conduct a survey of all Mississippi private schools as set forth in Paragraph (1) herein, including all such church-related schools, obtaining the information required by the permanent injunction, as amended, described herein, which shall be collected and maintained on an annual basis for each school for a period of three (3) years.

(9) The defendants are enjoined to take all reasonable steps to determine which, if any, church-related schools in Mississippi would come under Paragraph (1) herein.

(10) The defendants are further enjoined to make annual reports to this Court specifying the steps taken to implement the injunctive decree. The first report is to be made at the expiration of six (6) months from the date of this order, and thereafter on July 1 of each succeeding year for a period of three (3) years. It is further,

ORDERED, that, except for the modifications herein, the plaintiffs' motion for summary judgment be, and the same hereby is, denied; and that the defendants' motion for summary judgment be, and the same hereby is, denied.

George L. Hart, Jr.
UNITED STATES DISTRICT JUDGE

Dated: MAY 5- 1980

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
JUN 2 1980
JAMES F. DAVEY, Clerk

WILLIAM H. GREEN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 69-1355
	)	
G. WILLIAM MILLER, et al.,	)	
	)	
Defendants.	)	

ORDER CLARIFYING AND AMENDING COURT'S ORDER AND PERMANENT INJUNCTION OF MAY 5, 1980

Upon consideration of defendants' motion for clarification of this Court's Order and Permanent Injunction of May 5, 1980, and it now appearing that such clarification is appropriate, this Court states that it was its intention that the Order and Permanent Injunction should apply only to Mississippi private schools or the organizations that operate them, which have in the past been determined in adversary or administrative proceedings to be racially discriminatory; or were established or expanded at or about the time the public school districts in which they are located or which they serve were desegregating. It was not this Court's intention to include in its Order Mississippi private schools which had not been determined in adversary or administrative proceedings to be racially discriminatory, or which were established or expanded prior to the time the public school districts in which they are located or which they serve were desegregating. In order to make clear the Court's intention paragraphs (1), (3), (4), (6), (7) and (8) are amended to read as follows:

> (1) which have in the past been determined in adversary or administrative proceedings to be racially discriminatory; or were established or expanded at or about the time the public school districts in which they are located or which they serve were desegregating, and which cannot demonstrate that they do not racially discriminate in admissions, employment, scholarships, loan programs, athletics, and extra-curricular programs.
>
> (3) Provision II(A)(2) of the Permanent Injunction is amended to require that as to schools set forth in paragraph (1) printed notices must be published on a regular basis no less than four (4) times annually for a period of three (3) years in a newspaper of general circulation serving the area from which the school draws its student body.

(4) Provision II(A)(2)(a) is further amended to require that as to schools set forth in paragraph (1) any radio advertisements used by a school to publicize its policy of nondiscrimination must be broadcast with sufficient frequency to be reasonably designed to reach its intended audience in the minority community. A school employing this method of publicizing its nondiscriminatory policy must supply the IRS with the dates and times of transmission; the radio station used; the tape and a written transcript of the announcement; and both the number of times the message was broadcast on a particular day and the number of times it was broadcast during the year.

(6) Provisions II(B)(1)-(3) are further amended to require that as to schools set forth in paragraph (1) the following information be supplied on an annual basis for a period of three (3) years:

(a) the race of board members;

(b) the grades served by the school from its inception to the present;

(c) the date the school opened for the first time and grades served upon opening;

(d) the dates additional grades were added;

(e) whether the school is presently recognized as exempt from federal income taxes;

(1) the date on which the exemption was granted;

(f) whether the school received textbooks from the State of Mississippi under the State's textbook program;

(1) whether the school ever withdrew from such program or whether it was held ineligible to receive textbooks in any judicial or administrative proceeding;

(g) whether any tuition due the school has been waived;

(1) if so, the number of students, by race, granted such waiver during each school year.

(7) The defendants are enjoined from continuing in effect any ruling recognizing tax-exempt status of any Mississippi private school as set forth in paragraph (1) herein unless the showing and information required by the Permanent Injunction as amended shall be made and supplied within 120 days from the date of this Clarification Order, or such additional period, not to exceed 120 days, as defendants may provide on cause shown in order for the school to make the showing or supply the information required hereunder.

(8) The defendants are further enjoined to conduct a survey of all Mississippi private schools as set forth in paragraph (1) herein, including all such church-related schools which come under said paragraph, obtaining the information required by the permanent injunction, as amended, described herein, which shall be collected and maintained on an annual basis for each school for a period of three (3) years.

UNITED STATES DISTRICT JUDGE

DATED: JUN 2 - 1980

(N)

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March, 1982, a copy of Response of Clarksdale Baptist Church to Petitioners' Motion to Expedite Consideration and to Consolidate With Nos. 81-1 and 81-3 was mailed to each of the following:

Hon. Lawrence G. Wallace
Acting Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Norman J. Chachkin, Esq.
Lawyers' Committee for Civil Rights
Under Law
733 15th Street, N.W., Suite 520
Washington, D.C. 20005

George S. Leonard, Esq.
206 North Washington Street, Room 328
Alexandria, VA 22314

William Bentley Ball

Supplemental Brief

3

81-1626

Nos. 81-1 and 81-3

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GOLDSBORO CHRISTIAN SCHOOLS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

BOB JONES UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

MEMORANDUM OF PETITIONER BOB JONES UNIVERSITY RE: MOTION OF PETITIONERS IN GREEN V. REGAN TO CONSOLIDATE

WILLIAM BENTLEY BALL
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1

GOLDSBORO CHRISTIAN SCHOOLS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

No. 81-3

BOB JONES UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

MEMORANDUM OF PETITIONER BOB JONES UNIVERSITY RE: MOTION OF PETITIONERS IN GREEN v. REGAN TO CONSOLIDATE

A petition for a writ of certiorari was filed in this Court on March 3, 1982, by the plaintiffs in the case of Green v Regan (No. 81-1626). The same individuals on that day also filed a Motion to Expedite Consideration of Petition For a Writ of Certiorari and to Consolidate with Nos. 81-1 and 81-3. Bob Jones University hereby informs the Court of its strong opposition to the motion.

1. The fifteen individuals who are the Green plaintiffs are not parties in the Bob Jones University-Goldsboro Christian Schools cases, nor have they the remotest connection with this litigation. They bear no relationship to Bob Jones University or to Goldsboro Christian Schools, were never enrolled there, applied to be enrolled there, or had children who had. Unless settled principles respecting party status in litigation are to be displaced by litigational engineering to facilitate social objectives, these individuals must be barred from any role in this case sought to be achieved through the device of engrafting to it a case involving parties with no standing herein, a different record, and different issues.

2. The Court, by the plea for consolidation, is being asked to supply a party, manufacture a controversy, and prolong and complicate a litigation simply because one of the parties to that litigation has confessed error.

3. This attempted intrusion is not justified by allegation of "the overwhelming public importance" of the issues. Most cases reviewed by this Court involve substantial federal questions, and many of these are of "overwhelming" public importance. See, e.g., Rostker v. Goldberg, __U.S.__, 69 L. Ed. 2d 478 (1981); Dames & Moore v. Regan, __U.S.__, 69 L. Ed. 2d 918 (1981); Fullilove v. Klutznick, 448 U. S. 448 (1980); Harris v. McRae, 448 U. S. 297 (1980). By the Green plaintiffs' reasoning, in each of those cases groups with high interest in the outcome should have been accorded party status had they sought it.

4. Counsel for the Green plaintiffs are already amici curiae in this case, and that is unobjectionable. As amici they have already had their say as appropriate to interested non-parties. But to confer party status upon their clients, recognizing that those persons have rights adjudicable in this case, and in relation to which the rights of the schools in this litigation must be measured, would be palpably prejudicial to the latter.

For the foregoing reasons it is to be hoped that the Court will deny the motions. Further, no reason is known to exist for expedited consideration of the petitions. It is respectfully suggested that what is needed now is not expedited treatment of this baseless motion but expedited treatment of the case which the Court has already accepted for review.

Respectfully submitted,

William Bentley Ball

Philip J. Murren

Richard E. Connell

Kathleen A. O'Malley

Attorneys for Petitioner
Bob Jones University

March 12, 1982

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March, 1982, a copy of the foregoing Memorandum of Petitioner Bob Jones University was mailed to each of the following:

Hon. Lawrence G. Wallace
Acting Solicitor General
Office of the Solicitor General
Department of Justice
Washington, D.C. 20530

William G. McNairy, Esq.
Brooks, Pierce, McLendon,
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P.O. Drawer U
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William Bentley Ball

Opposition

2

Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
CLERK

No. 81-1626

In the Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM H. GREEN, ET AL., PETITIONERS

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether petitioners have properly invoked the jurisdiction of this Court under 28 U.S.C. 1254(a)(1) to seek certiorari before judgment of the court of appeals to review constitutional and statutory questions concerning the tax-exempt status of private schools which practice racial discrimination, where the only order issued by the district court was to suspend further proceedings to await the decisions of this Court in related cases.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 5

Conclusion 8

TABLE OF AUTHORITIES

Cases:

Bob Jones University v. *United States*, cert. granted, No. 81-3 (Oct. 13, 1981) 3, 4, 6, 8

Coleman v. *Paccar Inc.*, 424 U.S. 1301 5

Goldsboro Christian Schools, Inc. v. *United States*, cert. granted, No. 81-1 (Oct. 13, 1981) 3, 4, 6, 8

Green v. *Connally*, 330 F. Supp. 1150, aff'd mem. *sub nom. Coit* v. *Green*, 404 U.S. 997 ..... 2, 3, 5, 8

Green v. *Kennedy*, 309 F. Supp. 1127, appeals dismissed, 398 U.S. 956 and 400 U.S. 986 2

Morales Serrano v. *Playa Associates, Inc.*, 390 F. 2d 593 6

Morgenstern Chemical Co. v. *Schering Corporation*, 181 F. 2d 160 7

Switzerland Cheese Association v. *E. Horne's Market, Inc.*, 385 U.S. 23 ..... 6, 7

Page

Cases—Continued:

United States v. *Nixon*, 418 U.S. 683 5

Will v. *Calvert Fire Insurance Co.*, 437 U.S. 665 6

Constitution, statutes, rule and regulations:

United States Constitution, First Amendment 3

Internal Revenue Code of 1954 (26 U.S.C.):

Section 170 2
Section 501 2

28 U.S.C. 1254(1) 5, 7

28 U.S.C. 1292(a)(1) 6, 7

Sup. Ct. R. 18 5

Rev. Proc. 72-54, 1972-2 Cum. Bull. 834 3

Rev. Proc. 75-50, 1975-2 Cum. Bull. 587 3

Rev. Rul. 71-447, 1971-2 Cum. Bull. 230 3

Rev. Rul. 75-231, 1975-1 Cum. Bull. 158 3

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1626

WILLIAM H. GREEN, ET AL., PETITIONERS

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order of the district court (Pet. App. 1a) issued on February 4, 1982, is not officially reported. Prior reported opinions in this proceeding appear at 309 F. Supp. 1127 (D.D.C.), appeals dismissed, 398 U.S. 956 (1970) and 400 U.S. 986 (1971) (preliminary injunction); and 330 F. Supp. 1150 (D.D.C.), aff'd mem. *sub nom. Coit* v. *Green*, 404 U.S. 997 (1971) (declaratory judgment and permanent injunction).

JURISDICTION

On February 5, 1982, petitioners filed a notice of appeal to the United States Court of Appeals for the District of Columbia Circuit from the order of the district court of February 4, 1982. Petitioners assert that the order of February 4, 1982, was a denial of a motion for an injunction and that the court of appeals had jurisdiction over the case

under 28 U.S.C. 1292(a)(1); and seek certiorari before judgment, invoking the jurisdiction of this Court under 28 U.S.C. 1254(1) (Pet. 2-3).

STATEMENT

This suit was originally instituted in 1969 by petitioners, black schoolchildren and their parents living in Mississippi, seeking to enjoin the then-effective policy of the Internal Revenue Service and the Department of the Treasury granting federal tax exemptions to racially discriminatory private schools, and seeking a declaration (1) that granting tax exempt status to such schools violates Sections 170 and 501 of the Internal Revenue Code of 1954 (26 U.S.C.), or (2) that if granting such status is authorized by those statutes, then those provisions are unconstitutional. On January 12, 1970, a three-judge district court issued a preliminary injunction, *Green* v. *Kennedy*, 309 F. Supp. 1127 (D.D.C.), appeals dismissed, 398 U.S. 956 (1970) and 400 U.S. 986 (1971). Subsequently, in July 1970, the Service announced it would no longer interpret the Internal Revenue Code to allow exemption for private schools that practice racial discrimination. See *Green* v. *Connally*, 330 F. Supp. 1150, 1156 (D.D.C.), aff'd mem. *sub nom. Coit* v. *Green*, 404 U.S. 997 (1971).

On June 30, 1971, the three-judge district court issued a permanent injunction against the granting of tax exemption to private schools in Mississippi operated on a racially discriminatory basis, declaring that (330 F. Supp. at 1179):

> Section 501(c)(3) of the Internal Revenue Code of 1954 does not provide a tax exemption for, and Section 170(a)-(c) of the Code, does not provide a deduction for a contribution to, any organization that is operated for educational purposes unless the school or other educational institution involved has a racially nondiscriminatory policy as to students.

On the appeal of intervenors who asserted that the decision impaired their freedom of association, this Court summarily affirmed. *Coit* v. *Green, supra.*

Following the district court's 1971 decision, the Internal Revenue Service issued a series of revenue rulings and revenue procedures concerning the eligibility of private schools for tax exempt status, consistent with that decision.[1] In 1976, however, petitioners reopened the case and sought additional injunctive relief to carry out the original decree and judgment. The district court granted such relief in two orders entered on May 5 and June 2, 1980.

Following entry of those orders, the Clarksdale Baptist Church successfully sought leave to intervene in this action to contest, on First Amendment grounds, the applicability of the court's orders to a school operated by a church. That First Amendment claim was pending when, on motion of the church filed December 14, 1981, the district court suspended all further proceedings, pending decision of this Court in *Goldsboro Christian Schools, Inc.* v. *United States,* and *Bob Jones University* v. *United States,* cert. granted, Nos. 81-1 and 81-3 (Oct. 13, 1981).

On January 13, 1982, petitioners, referring to recent filings with this Court in Nos. 81-1 and 81-3, filed a motion with the district court, asking that it vacate its stay of all proceedings in this case entered on January 6, 1982. Petitioners further sought injunctions requiring respondents Secretary of the Treasury and Commissioner of Internal Revenue to continue to enforce the pertinent revenue rulings and revenue procedures, and to adhere to the prior injunctive decrees of the district court. In response to that motion, on January 25, 1982, the government submitted an

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[1]See Rev. Rul. 71-447, 1971-2 Cum. Bull. 230; Rev. Proc. 72-54, 1972-2 Cum. Bull. 834; Rev. Rul. 75-231, 1975-1 Cum. Bull. 158; Rev. Proc. 75-50, 1975-2 Cum. Bull. 587.

affidavit to the district court from the Assistant Commissioner (Employee Plans and Exempt Organizations) of the Internal Revenue Service representing that the Service would continue to comply with its prior injunctive decrees. See Supplemental Memorandum for the United States in Nos. 81-1 and 81-3, at 13a-14a (filed Feb. 3, 1982).

Thereafter, on February 4, 1982, after hearing argument, the district court denied petitioners' motions to vacate the existing stay of further proceedings and for permanent injunctive relief, assuring petitioners that it would act promptly after this Court disposed of the *Goldsboro Christian Schools* and *Bob Jones University* cases. On February 5, 1982, petitioners filed a notice of appeal from that order to the court of appeals.[2]

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[2]Subsequently, on February 10, 1982, plaintiffs in *Wright* v. *Regan*, petition for certiorari pending, No. 81-970 (filed Nov. 23, 1981), moved in the court of appeals for relief under the "All Writs Act." See Motion for Injunction Pending Appeal or in the Alternative for Injunction Under "All Writs Act" to Preserve Effectiveness of This Court's Mandate, dated Feb. 10, 1982. In response, the court of appeals issued an order in that case on February 18, 1982, that—

> [T]he Secretary of the Treasury and Commissioner of Internal Revenue are directed not to grant or restore federal tax-exempt status pursuant to 26 U.S.C. § 501(c)(3) to any school that unlawfully discriminates on the basis of race, see *Runyon* v. *McCrary*, 427 U.S. 160 (1976), by failing to maintain a "racially nondiscriminatory policy as to students," as that term is defined in the declaratory judgment in *Green* v. *Connally*, 330 F. Supp. 1150, 1179 (D.D.C.), *aff'd mem. sub nom. Coit* v. *Green*, 404 U.S. 997 (1971).

The government filed responses opposing plaintiff's motion on February 17, 1982 and March 5, 1982. On March 24, 1982, the court of appeals continued its order of February 18, 1982, on the condition that within 20 days, the plaintiffs apply in the district court for relief similar to that granted by the order of February 18, 1982. Thus, the time within

ARGUMENT

Petitioners seek certiorari before judgment of the court of appeals in order to resolve the question whether the Secretary of the Treasury and the Commissioner of Internal Revenue are empowered under the Internal Revenue Code and the Constitution to grant tax-exempt status and deductibility of contributions to private schools which practice racial discrimination, and to consider the applicability of this Court's decision in *Coit* v. *Green*, 404 U.S. 997 (1971), aff'g mem. *Green* v. *Connolly*, 330 F. Supp. 1150 (D.D.C. 1971), to that question. Although this Court can issue a writ of certiorari under 28 U.S.C. 1254(1) to bring before it a case prior to judgment of the court of appeals, "the exercise of such a power is an extremely rare occurrence." *Coleman* v. *Paccar Inc.*, 424 U.S. 1301, 1304 n. (1976) (Rehnquist, Circuit Justice); Sup. Ct. R. 18.

As petitioners acknowledge (Pet. 7), this Court may issue a writ of certiorari to a court of appeals only when the case is properly "in" the court of appeals. *United States* v. *Nixon*, 418 U.S. 683, 692 (1974). In our view, the court of appeals lacks jurisdiction over the case. It is therefore not properly in the court of appeals; and, consequently, it is not subject to review by this Court pursuant to 28 U.S.C. 1254(1).[3]

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which the plaintiffs may make such application in the district court expires on April 13, 1982.

On February 22, 1982, the government advised this Court in Nos. 81-1 and 81-3 that—

> The District of Columbia Circuit's order in *Wright* changes the posture of these cases before the [Supreme] Court. In light of that court's order, the Secretary [of the Treasury] has determined not to grant or restore tax-exempt status to petitioners, or to revoke the pertinent Revenue Rulings, pending final disposition of these cases by this Court. Our previous suggestion of mootness is therefore no longer appropriate.

Mot. for Leave to File Br. Out of Time, at 3 (filed Feb. 25, 1982).

[3]Respondents will file a motion in the court of appeals to dismiss the appeal on grounds of lack of jurisdiction.

The procedural history of this litigation belies petitioners' assertion (Pet. 7) that the case is "in" the court of appeals. The district court suspended further proceedings in this case pending action by this Court in the *Goldsboro Christian Schools* and *Bob Jones University* cases. As a prerequisite to obtaining other relief, petitioners were first obliged to obtain an order lifting that suspension. In their motion of January 13, 1982, petitioners first moved the district court to lift its stay of proceedings. The district court, in a proper exercise of its wide discretion to avoid duplicative litigation and to control its own docket (see *Will* v. *Calvert Fire Insurance Co.*, 437 U.S. 655 (1978)), entered an interlocutory order on February 4, 1982, keeping the suspension in effect. The denial of a motion to lift a court's stay of its own proceedings is not one of the interlocutory orders made appealable by 28 U.S.C. 1292(a)(1), and consequently is not reviewable by a court of appeals. See, *e.g.*, *Morales Serrano* v. *Playa Associates, Inc.*, 390 F. 2d 593, 594 (1st Cir. 1968) (district court order staying proceedings in case before it not appealable).

Because the district court refused to lift its suspension of proceedings, it perforce did not reach the merits of petitioners' request for further relief. Indeed, although the court's order states that "the plaintiffs' request for further injunctive relief is DENIED" (Pet. App. 1a), it is apparent that the court made no resolution on the merits of petitioners' claim, but merely postponed substantive consideration of the motion. At the hearing, the district court orally advised the parties that it would act promptly when, and only when, this Court disposed of the *Goldsboro Christian Schools* and *Bob Jones University* cases.

As this Court's decision in *Switzerland Cheese Association* v. *E. Horne's Market, Inc.*, 385 U.S. 23 (1966), makes clear, the district court's order of February 4, 1982, is not reviewable under 28 U.S.C. 1292(a)(1). There, the petitioners moved for a summary judgment granting a permanent

injunction and awarding damages. The district court denied the motion because it could not conclude that there was no genuine issue as to material fact. Petitioners sought review of the order under 28 U.S.C. 1292(a)(1), contending that it was an interlocutory refusal to grant an injunction. This Court rejected that contention, holding that the "denial" of a motion for permanent injunctive relief which "does not settle or even tentatively decide anything about the merits of the claim," but which "only relate[s] to pretrial procedures [is] not * * * 'interlocutory' within the meaning of § 1292(a)(1)" (385 U.S. at 25). See also *Morgenstern Chemical Co.* v. *Schering Corporation* 181 F. 2d 160, 162 (3d Cir. 1950). Since the district court's order of February 4, 1982, similarly did not touch on the merits of petitioners' claim for permanent injunctive relief, but only postponed consideration of their claim, it too was not an interlocutory order of the type described in 28 U.S.C. 1292(a)(1). Accordingly, the case was not properly "in" the court of appeals, and petitioners cannot invoke this Court's certiorari jurisdiction under 28 U.S.C. 1254(1).[4]

At all events, petitioners advance no convincing reason why a writ of certiorari should be granted in this case. The petition presents two questions: Whether, (1) under the Internal Revenue Code or (2) under the Constitution, the Secretary of the Treasury and Commissioner of Internal

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[4]Indeed, it is plain that petitioners have no present interest in setting aside the district court's order refusing to lift the suspension of further proceedings, which is the only action taken by the court in this case. Thus, after petitioners, on February 10, 1982, filed in the court of appeals a motion for an injunction pending appeal, petitioners wrote the court of appeals on March 8, 1982 stating that—

> [W]e believe it would be appropriate for the panel to hold the Motion for Injunction Pending Appeal in abeyance at the present time. If irreparable harm to plaintiffs is not again threatened by government action, the Court may be spared the necessity of ruling upon the motion at all.

Revenue may grant tax-exempt status to private schools that practice racial discrimination. However, the constitutional question has never been decided by the district court (see 330 F. Supp. at 1164-1165). Although the statutory question was decided by that court (see *id.* at 1179), it has not again been raised thus far in this proceeding.[5] Thus, neither the statutory nor the constitutional issue as to which petitioners seek review is in fact presented in this case in its present posture.[6] Moreover, since the statutory question is already before this Court in the *Goldsboro Christian Schools* and *Bob Jones University* cases, there is no reason why this Court should grant certiorari here simply to permit an additional party to raise the same question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

APRIL 1982

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[5]The government has advised the district court that it would continue to comply with the prior injunctive decrees in this proceeding.

[6]In their letter to the court of appeals, *supra*, page 7, dated Mar. 8, 1982, petitioners conceded as much, by stating (at 3)—

> The Petition [in *Green* v. *Regan*] does not seek review by the Supreme Court of the issues before this Court on the present appeal—but of the more basic question of the proper construction of the Internal Revenue Code settled by the declaratory judgment issued in 1971 and summarily affirmed by the Supreme Court that same year.

DOJ-1983-04